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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002
No. 02-524

KURT JONES, WARDEN.
Petitioner.

vs.

DUYONN ANDRE VINCENT.
Respondent.

ON WRIT OF CERTIORARI
TO THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF OF
WAYNE COUNTY PROSECUTING ATTORNEY
AS AMICUS CURIAE
IN SUPPORT OF PETITIONER

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STATEMENT OF THE QUESTION

I.

Do principles of double jeopardy bar reconsideration by the trial judge of the granting of a motion for directed verdict of acquittal, where the jury has not been discharged or informed of the granting of the motion, so that the result of the reconsideration of the motion by the trial judge is that the trial simply continues on before the same jury?

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Interest of the Amicus

Amicus is the Prosecuting Attorney for Wayne County, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. Amicus, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has a vital interest in the outcome of the current litigation, as it will directly affect the execution of his constitutional and statutory duties.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits *Amicus* to file a supporting brief without permission of the parties.

Statement of Material Facts and Proceedings

Amicus concurs with the statement by the Petitioner.

Argument

A. Introduction

(1) Factual Background

One thing is clear in this case: no defense wish to have this case determined by the jury was thwarted, the defense seeking to avoid a jury resolution of the premeditation element. Nor was any interest protected by the double jeopardy clause compromised by simply *continuing* the trial before the same tribunal as it would had the trial judge simply denied the motion in the first instance. There is also no question that there was no attempt to harass the defendant through repeated prosecutions, as all the prosecution sought was one full and fair opportunity to have the case decided by the jury impaneled to hear the case.

At the close of the prosecution's proofs in this case defense counsel moved for a directed verdict on the first degree murder charge, arguing a lack of premeditation. The result of the granting of the motion would limit the jury's consideration to a maximum charge of second-degree murder. The trial judge granted the motion. The next morning, after argument from the prosecution, the trial court reconsidered its decision. It noted that it had neither informed the jury of its previous ruling nor discharged it from consideration of the first degree murder case, and, in fact, had simply "granted a motion," but had not "directed a verdict" in that the charge had not been withdrawn from the jury. Based on cases from other jurisdictions, the Court of Appeals held that because the reconsideration of the ruling by the trial judge "resulted in further proceedings" directed to the first degree murder charge, jeopardy barred the actions of the trial judge. That the "further proceedings" were the continuation of the *very same trial*, from which the jury had not been discharged, which was *not* the case in any of the cases from this Court on which the "judicial acquittal" doctrine was established, received no note

from the court. In fact, the point is critical. To ignore it removes jeopardy law from its moorings, and is neither necessary nor even relevant to the protection provided by the clause against government oppression by repeated attempts to convict the accused. It is the People of the State, in whose name prosecutions are brought, who are oppressed and aggrieved when jeopardy is viewed as barring reconsideration of the decision on a motion for directed verdict when the jury has not been discharged, and nothing in the decisions of the this Court requires this decidedly odd result.

The Michigan Supreme Court reversed the Court of Appeals. That court found that respondent's double jeopardy protection had not been violated because the trial judge's "inchoate impressions did not mature into a final judgment of acquittal of the charge." The trial judge had stated when ruling that it was his "impression at this time" that premeditation had not been shown, so that "I think that Second Degree Murder is an appropriate charge as to the defendants." The federal district court, however, granted a writ of habeas corpus, disagreeing with the Michigan Supreme Court as to the legal effect of the trial court's statement of "impressions." The Sixth Circuit then affirmed, relying on the fact that the clerk had entered the ruling on the docket sheet. Finding that the trial court had granted a directed verdict, the panel then quickly concluded that the trial judge "was not entitled to reverse that decision later in the trial. It is irrelevant whether the trial judge had informed the jury of his decision....the trial judge subjected the petitioner to prosecution for first-degree murder in violation of the Double Jeopardy Clause." *Vincent v Jones*, 292 F3d 506, 512 (CA 6, 2002). The federal courts have erred.

(2) The Legal Issues, and the Approach of the Amicus

The holding of the Court of Appeals precludes a judge from correcting an erroneous decision on a motion for

directed verdict even *moments* after made, upon a discovery of clear error, and before discharge of the jury. No principle served by the jeopardy clause is served by such a result.

It will be the position of amicus that, so long as the jury is not discharged, even a "true" directed verdict of acquittal (that is, one which actually goes to an element of the offense) may be reconsidered by the trial judge, as if the judge changes his or her mind, the result is simply the continuation of the existing jeopardy, and not a second or successive (or multiple) jeopardy at all. Along the way, amicus will make observations regarding the way "things ought to be"; that is, that the granting of a motion for directed verdict should be understood not as an acquittal, but as a *ruling law* that no rational factfinder could find guilt beyond a reasonable doubt, which is either correct or not, and should be subject to appellate review not only if denied, but if granted. Jeopardy principles are not offended by a second trial if the ruling is found to be incorrect, for the first trial is terminated *at the request of the defendant, in making the motion*. Retrial should be permitted in this circumstance.[1] A directed verdict of acquittal entered by a judge in a jury trial is not a "true acquittal," but is rather a ruling of law. No interest historically protected by the jeopardy clause is offended by review of that decision, or by a second trial on a finding of error committed by the trial judge.

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1. As will be seen, this Court has itself noted on a number of occasions that the law of double jeopardy is and has been in a state of "confusion," with its decisions far from "models of consistency and clarity." See *Burks v United States*, 437 US 1, 98 S Ct 2141, 57 L Ed 2d 1 (1978).

B. The Interests Protected By The Jeopardy Clause: A Brief Look At History

Given that the Fifth Amendment to the federal constitution provides, in terms that admit of no exceptions, that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb...," the question arises as to the justification for *ever* allowing retrials for any reason. The answers must be found in history, logic, and sound policy, for as Justice Holmes, writing for the Court in *Gompers v United States*, 233 US 604, 58 L Ed 1115, 34 S Ct 693 (1914), observed long ago, "the provisions of the Constitution are not mathematical formulas...; they are organic, living institutions transplanted from English soil....(whose significance and scope must be determined) not by simply taking the words and a dictionary, but by considering their origin and the line of their growth."

(1) The Prohibition On Retrial After Acquittal or Conviction

The prohibition in the federal constitution against double jeopardy was, as is commonly understood, derived from the common-law English pleas of autrefois acquit and autrefois convict. Blackstone stated that

> ...the plea of autrefois acquit, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once, for the same offence. And hence it is allowed as a consequence, that when a man is once ***fairly*** found not guilty upon any indictment, or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime (emphasis added).

4 Blackstone Commentaries 335.[2]

Blackstone also observed that the:

> plea of autrefois convict, or a former conviction for the same identical crime...is a good plea in bar to an indictment. And this depends upon the same principle as the former, that no man out to be twice brought in danger of his life for one and the same crime....

4 Blackstone's Commentaries at 329-331.

These pleas in bar were a reaction to generations of multiple prosecutions, which were "so commonplace that the only people to escape such a fate were those capable of surviving the tortuous physical battles of trial by ordeal." See "The Double Jeopardy Clause of the Fifth Amendment," 26 Am Crim L Rev 1477, 1479 (1989).

This tradition of the pleas in bar of autrefois acquit and autrefois convict, each of which required a judgment by the jury in a prior proceeding as a necessary prerequisite, was carried over to the legal tradition of the colonists, see e.g. the Massachusetts Body of Liberties of 1641. New Hampshire was the first colony to specifically recognize the jeopardy bar in its post-revolutionary constitution, providing that "No subject shall be liable to be tried, after an acquittal, for the same crime or offence." N.H. Const, art I, sec. 16 (1784). Courts in other states also recognized this form of plea in bar. See 26 Am Crim L Rev at 1480-1481.

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2. As well as autrefois attaint, or corruption of the blood, which has long since been obsolete.

This rich history was thus before the First Congress which proposed the Bill of rights, including the double jeopardy prohibition. As originally proposed by Madison, the clause simply stated: "No person shall be subject, except in cases of impeachment, to more than one punishment or *one trial* for the same offence...."(emphasis added). 1 Annals of Cong 434. The original amendments submitted to the House for consideration included an amendment to prohibit a "second trial after acquittal." The language which evolved prohibiting more than "one trial" was roundly debated, as concern was expressed that this language might prevent a second trial *even where sought by the defendant* on a claim of error after a conviction, whereas the common law was to the contrary. The result was the language now appearing in the Fifth Amendment jeopardy clause, referring, significantly, to *one jeopardy*, rather than *one trial*.

Thus, our jeopardy clause is an amalgam of common law pleas in bar, which required an actual judgment in a prior proceeding before the bar could be effectively pled. As stated by Justice Story at a time very much closer to the ratification of the Bill of Rights, the double jeopardy clause was understood to mean "that a party shall not be tried a second time for the same offense, after he has once been convicted, or acquitted of the offense charged, by the *verdict of a jury, and judgment passed thereon for or against him*" (emphasis added). Story, 3 *Commentaries on the Constitution*, (1833) sec 1781, p. 659. The historical underpinning of the jeopardy protection, then, with regard to acquittals, is that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v United States*, 355 US 184, 78 S Ct 221, 2 L Ed 2d 199 (1957). The law of jeopardy with regard to prosecutions after

an acquittal has continued to develop, and amicus will turn to the modern development of the "acquittal" doctrine shortly.

(2) The "Valued Right to Have the Trial Completed By A Particular Tribunal"

Because it is the acquittal doctrine which forms the heart of this case, amicus will not tarry long regarding the jeopardy interests involved in mistrials; that is, terminations of the trial before verdict, and *against the will* of the defendant. The doctrine requires a termination against the will of the defendant, for consent to termination of the trial without a verdict is consent to a second trial, whether that consent be premised on a claim of some error occurring in the proceedings, or upon some claimed legal bar to the proceedings (such as a midtrial claim of a violation of speedy trial, or double jeopardy, or a defective information). See *United States v Scott*, 437 US 82, 98 S Ct 2187, 57 L Ed 2d 65 (1978).

It quickly became clear in our jurisprudential history that the jeopardy clause does not bar retrials after a termination of the first trial absent the defendant's consent and before verdict in at least some circumstances. In *United States v Perez*, 22 US 579; 6 L Ed 165 (1824) the Court held that a retrial was permitted following a mistrial occasioned by a failure of the jury to reach a verdict, as "the prisoner has not been convicted or acquitted, and may again be put upon his defense." The pleas in bar of autrefois acquit and autrefois convict were simply unavailable absent a conviction or acquittal. *Perez* has held the day throughout this country for these last 179 years. Further, in *United States v Ball*, 163 US 662-671, 41 L Ed 300-303, 16 S Ct 1192 (1895) it was held that a second trial was permissible after a conviction had been set aside (and that retrial was barred by an acquittal for a codefendant, at least where that acquittal had not been

overturned on appeal). The doctrine of *Perez* has also been applied to situations where the trial did not proceed to verdict for reasons other than the failure of the jury to agree, upon a finding of manifest necessity. See e.g. *Wade v Hunter*, 336 US 684, 93 L Ed 974, 69 S Ct 834 (1949).

Properly and historically understood, however, the double jeopardy clause actually encompasses no right to a determination of the matter before a particular tribunal, for, as Justice Story said, the double jeopardy protection is only triggered by a prior adjudication of guilt or innocence. The right to a determination of guilt or innocence by the particular jury existed in England as a *separate* doctrine from the pleas in bar, see 3 Coke, *Institutes* 110 (6th Ed, 1681), and the violation of this principle of jury practice could not be pled as a bar to a subsequent action, it being more a matter of discretion for the court. See Kirk, "'Jeopardy' During the Period of the Year Books," 82 U Pa L Rev 602, 611 (1934). Justice Powell has consequently expressed the view that an abusive termination of the trial prior to verdict should be considered under the rubric of due process, rather than under more stringent jeopardy principles. See *Crist v Bretz*, 437 US 28, 98 S Ct 2156, 57 L Ed 2d 24 (1978), Justice Powell, dissenting.

In any event, in this case the defendant plainly *did not want the case adjudicated by the jury*, and having moved for a prohibition on a jury verdict by the judge by way of a motion for a directed verdict of acquittal, cannot be heard to complain that the valued right to a determination of this matter by that tribunal was violated, a notion which makes no sense given that the trial *did* proceed before the same tribunal.

C. Reconsideration of Directed Verdicts of Acquittal Prior to Discharge of the Jury

With these jeopardy interests in mind, amicus will discuss the question of reconsideration of a directed verdict of acquittal by the trial court prior to the discharge of the jury. First, however, it is necessary to trace quickly the development of the doctrine of "judicial acquittals" in jury cases.

(1) What Is An Acquittal? From Kepner To Fong Foo Through Martin Linen Supply and Sanabria

That the prosecution cannot appeal an acquittal *by the factfinder* in the case was first established in *Kepner v United States*, 195 US 100, 49 L Ed 114, 24 S Ct 797 (1903), where the majority of the Court held that jeopardy precluded a retrial after acquittal, even where the acquittal was the result of error as against the People in the trial of the case. Though this may seem indisputable now, a cogent dissent was registered by Justice Oliver Wendell Holmes. In his characteristically laconic style, Justice Holmes supplied a consistent and logical answer to the question of why and when retrials are permitted. Observing that a defendant might be retried if the jury disagreed as to a verdict, that a defendant might be retried if a conviction was set aside on the prisoner's exceptions, and that the defendant might be retried on a new indictment if the judgment on the first was arrested upon motion, Justice Holmes stated his operating thesis:

> ...it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often that he may be tried. *The jeopardy is one continuing jeopardy, from its beginning to the end of the cause*. Everybody agrees that the principle in its origin was a rule forbidding a

> trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case (emphasis added). 49 L Ed at 126.

The issue before the Court in *Kepner* was whether a retrial was possible following the setting aside of an acquittal due to error occurring at trial as against the People. Justice Holmes would have held that retrial was *permissible*, as the defendant "no more would be put in jeopardy a second time when retried because of a mistake of law in his favor, than he would be when retried for a mistake that did him harm. It cannot matter that the prisoner procures the second trial." 49 L Ed at 127. Justice Holmes dismissed the argument that a retrial following reversal was permissible upon a theory of waiver, remarking that "it cannot be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States." 49 L Ed at 127. The logical conclusion, wrote Justice Holmes, is that the "necessary alternative is that the Constitution permits a second trial in the same case....The reason, I submit, is that there can be but one jeopardy in one case." 49 L Ed at 127.

The logic of Justice Holmes is unassailable, and his theory of continuing jeopardy provides a cogent explanation for retrials. There are no "exceptions" to the double jeopardy command; rather, jeopardy is simply not offended by retrials where the case is not truly concluded, there being "but one jeopardy in one case." This "continuing jeopardy" rationale has much to commend it.

The development of the modern doctrine of "judicial acquittals" began with *Fong Foo v United States*, 369 US 141, 82 S Ct 671, 7 L Ed 2d 629 (1962). There a corporation and two of its employees were brought to trial for conspiracy, as

well as a substantive offense. After seven days of trial, and the promise of many more, and while the fourth government witness was testifying, the district judge directed the jury to return verdicts of acquittal as to all defendants, and a formal judgment of acquittal was entered. The trial judge's action was based on alleged misconduct of the assistant United States Attorney, and a supposed lack of credibility of the witnesses to that point. The government appealed, and the Circuit Court of Appeals reversed, holding that the district court had no authority to grant the directed verdict of acquittal under the circumstances of the case. The United States Supreme Court, though agreeing with the Court of Appeals that the "acquittal was based upon an egregiously erroneous foundation," nonetheless held that the verdict of acquittal was "final and could not be reviewed." In its per curium opinion, which stretches to amount to a page and one half, the Court reached this conclusion without any analysis of whether a "judgment of acquittal" either entered or ordered by the trial judge, rather than reached by the jury through its own deliberations, falls within the protections of the double jeopardy clause as the scope and purpose of that clause are revealed in history. In short, the Court begged the question critical to the inquiry. But it is, for present purposes, important to note the context of the ruling: the jury had been *discharged*, and a successful appeal required not simply *further proceedings in the same trial*, but a *second trial*.

Fong Foo was followed in *United States v Martin Linen Supply*, 430 US 564, 97 S Ct 1349, 51 L Ed 2d 642 (1977). A judgment of acquittal was entered on defense motion after the jury had been discharged because of an inability to agree. Focusing on the jeopardy interest against the prevention of "multiple trials," 51 L Ed 2d at 649, the Court found jeopardy offended by the prosecution's appeal because a successful government appeal would result in "another trial." 51 L Ed 2d at 650. Though certainly second trials are permissible in some circumstances, continued the Court, this is not so after an acquittal, which the Court then

determined is defined as "a resolution, correct or not, of some or all of the *factual elements* of the offense charged," in the context of a "judicial acquittal."

The rationale was similar in *Sanabria v United States*, 437 US 54, 98 S Ct 2170, 57 L Ed 2d 43 (1978). After all sides had rested, the trial judge excluded evidence in the case on the ground that the Government had cited the wrong underlying state statute in its indictment, and in the absence of any other evidence of guilt, then, on defendant's motion, entered a "judgment of acquittal." The Government appealed, pointing out that a technical defect in the indictment was correctable under the Federal Rules of Criminal Procedure. The First Circuit held that the proceedings had terminated on grounds *unrelated* to criminal liability of the defendant; the Supreme Court, while agreeing that a dismissal on grounds unrelated to criminal culpability is not even a "judicial acquittal" under *Martin Linen Supply*, held that what had occurred was not a dismissal, but an evidentiary ruling, followed by a judicial acquittal, which, under *Martin Linen Supply*, "however erroneous, bars further prosecution on any aspect" of the case. While a defendant seeking a midtrial termination of the proceedings on a "legal" ground thus takes "the risk that an appellate court will reverse the trial court," see *United States v Scott*, supra, a defendant who seeks a termination of the trial prior to verdict by seeking a "judicial acquittal" does *not* take the risk that an appellate court will reverse the trial court, said the Court. Why this is so or how any interest protected by the jeopardy clause is served by such a distinction was not explained, nor, amicus submits, is it explainable. But, again, with regard to the instant case, the context of the Court's holding is critical: the jury was discharged by the trial court, and a successful appeal thus required not simply "further proceedings" (i.e. in the same trial), but a *second* trial.

In sum, then, the "judicial acquittal" rule, as explained by this Court, does not bar any "further proceedings" after a

judicial acquittal, as assumed by the Court of Appeals here, but a *second trial*. Nothing in logic compels the result that a judicial decision on a motion for directed verdict cannot be revisited and the *first* trial continued even under existing jeopardy doctrine, nor is any interest protected by the jeopardy clause served by such a rule, which prevents a trial judge from reconsidering his or her decision even *seconds* after made, on an erroneous basis, and before the jury has been discharged or even informed of the court's decision. Nothing compels a rule that, at least in this context, places "in the hands of a single judge the great and dangerous power of finally acquitting the most notorious criminals" when a jury trial is being had. See Justice Brown, dissenting in *Kepner*, 49 L Ed at 128.

(2) Review of A Judicial Acquittal In A Jury Case Prior to Discharge of the Jury

Amicus submits that disallowing review of a judicial acquittal in a jury case (aside from the view of the amicus, set forth below, that "judicial acquittals" on defense motion should not bar appeal and retrial in any event) when the jury has not been discharged, so that a reconsideration by the trial judge or reversal by an appellate court results in continuation of the original trial, cuts *Fong Foo*, *Martin Linen Supply*, and *Sanabria* loose from their juridical moorings, and is bad policy which the constitution does not require. Further, there is case law to the contrary, which the Court of Appeals opinion did not cite.

This case is a vivid demonstration of a phrase being wrenched from its constitutional moorings and given talismanic properties. Typical of cases making this same error is *People v Strong*, 472 NE2d 1152 (Ill App, 1984). At the close of the State's case the defense moved for a directed verdict on a home invasion charge, which was only one count, the defense arguing that the State had failed to prove that the

defendants had entered the residence without authority. The motion was granted. The next day, on motion of the State, the court rescinded its order, determining that there was sufficient evidence on the authority question for the jury to decide it. The defendants were convicted. The Illinois Court of Appeals agreed that the original granting of the directed verdict was erroneous. 472 NE2d at 1155. The court, however, held that the directed verdict was final despite the fact that the jury had not been discharged, because "further proceedings" were required after it was set aside, although they were not only a part of the same "jeopardy," but the very same trial. The court did not explain how any case from the United States Supreme Court required this result; none does.

A contrary result was reached in *People v District Court for the Seventeenth District*, 663 P2d 616 (Colo, 1983), on facts virtually indistinguishable from those in *Strong*. The defendant was tried for sexual assault in the first degree, first degree burglary, and the commission of a crime of violence. At the close of the prosecutions proofs the defense moved for a judgment of acquittal, which was granted on the greater inclusive offenses of sexual assault in the first degree, burglary in the first degree, as well as the crime of violence charge, the court ruling it would submit lesser included offenses to the jury. The next morning the court announced that it had made a mistake in granting the motion as to the sexual assault in the first degree assault charge. The defendant was convicted. When the verdicts were set aside for other reasons, defendant moved to dismiss the sexual assault in the first degree charge on grounds of double jeopardy, arguing that the trial judge could not set aside its erroneous verdict of acquittal.

The Colorado Supreme Court disagreed, correctly observing that the concern of the federal jeopardy clause, as explicated in *Martin Linen Supply*, was *multiple trials for the same crime*. 663 P2d at 619. But Colorado has a more expansive view of jeopardy under its own state constitution

and precludes retrial even after an erroneous midtrial dismissal on legal grounds, thus granting greater protection than does the federal jeopardy clause. Nonetheless, that right was not abridged, held the court, because *there was no second trial*, and thus there *was no multiple prosecution*. As the court cogently declared:

> It is quite obvious that the respondent court's mid-trial correction of its erroneous ruling on a motion for a judgment of acquittal did not impair the primary interest which the Double Jeopardy Clause seeks to accommodate--the elimination of the threat of multiple trials for the same offense....The corrective ruling, in other words, did not result in any additional governmental attempt to convict Conley before a different jury or undermine in the least Conley's interest in having his trial completed by the particular jury impaneled and sworn to resolve the controversy.
>
> 663 P2d at 621.

Unlike the Colorado Supreme Court, the Court of Appeals in the instant case failed to tie the jeopardy analysis to the interest protected by the jeopardy clause.

A second case avoiding the error committed by the Court of Appeals here is *State v Iovino*, 524 A2d 556 (RI, 1987). Again the trial judge reduced charges on a motion for a directed verdict of acquittal, the trial to continue on lesser included charges, and again, without any discharge of the jury, and without the jury having been informed of the directed verdict, the trial judge reconsidered and allowed the trial to go forward on the original charges. The Rhode Island Supreme Court agreed that the original reduction of charges by way of a directed verdict on the greater offense was erroneous; indeed, the defendant did not argue the point,

arguing only that "principles of double jeopardy mandate(d) that the decision, once made, could not be reconsidered." 524 A2d at 558. The court reviewed *Martin Linen Supply* and determined that the lynchpin of the decision was that the jeopardy is offended when the jury has been discharged after a directed verdict, thus requiring a second trial. As the court put it, "The nub of the distinction between this case and *Martin Linen Supply Co.*, lies in the fact that the reconsideration in this case had no effect on the continuance of the trial in which it was made" so that "the defendant was not faced with any threat of reprosecution beyond the jury already assembled to hear his case." 524 A2d at 559.

A federal circuit has also reached a contrary result. In *United States v Washington*, 48 F3d 73 (CA 2, 1995) the trial judge orally granted defendant's motion for acquittal as to a count at the close of the prosecution's case. The trial continued, and the trial judge, who had expressly declined to inform the jury of the dismissal of the charge, reviewed the matter and reversed his prior "grant of acquittal." The second circuit held that "an oral grant of a motion for acquittal is 'no more than an interlocutory order,' which the court has 'inherent power to reconsider and modify...prior to the entry of judgment.'...Such conduct did not subject (defendant) to a 'second trial' or 'successive prosecution.' 48 F3d at 79. The present case is not distinguishable.

(3) Conclusion

The historical underpinnings of the jeopardy clause that amicus has very briefly sketched reveal that no interest protected by the jeopardy clause is served by disallowing reconsideration of the granting of a motion for directed verdict of acquittal prior to the discharge of the jury. Continuing the trial as before the ruling does not result in "repeated attempts" to "harass" and "oppress" the accused, but vindicates the State's interest in a full and fair opportunity to obtain a true verdict from the jury. Those cases from this

Court delineating the current "judicial acquittal" doctrine all involve the discharge of the jury, and thus do not support the result of the Court of Appeals here.

D. A Judicial Acquittal, Sought By The Defendant, Should Be Appealable, and A Retrial Permitted Upon A Finding of Error

Moreover, a directed verdict of acquittal is not a "true" acquittal. Where such a ruling of law is sought by the defendant, who thereby voluntarily relinquishes his or her right to a jury verdict, that ruling should be reviewable for legal error. If legal error is found, a second trial should be permitted..

As a matter of history the development of jeopardy principles did not initially include any power of the court to take a case from the jury and enter a verdict of acquittal, as no such authority existed. As that authority developed, initially it was not an authority to take the case from the jury, but rather to *instruct* the jury that its duty was to acquit, the verdict still being delivered by the jury. The jury might disregard such an instruction, and, if it did so, the verdict was subject to reversal-but, of course, on appeal the Government could oppose on the ground that the instruction was unwarranted given the evidence. As the authority to actually direct the jury to a verdict of acquittal evolved to become authority for the court to take the case from the jury before deliberation and verdict, it was characterized as a ruling of *law* that there was no evidence on an element or elements (now, that no reasonable jury could find guilt beyond a reasonable doubt given the proofs). The judge must take the evidence in the light most favorable to the prosecution, taking that evidence as true, and drawing all inferences reasonably inferable in favor of guilt. See "Directions for Directed Verdicts: A Compass for Federal Courts," 55 Minn L Rev 903 (1971); Henderson, "The Background of the Seventh Amendment," 80 Harv L Rev 289 (1966), Westen and Drubel,

"Toward A General Theory of Double Jeopardy," 1978 Sup Ct Rev 81 (1978); "Power and duty of court to direct or advise acquittal in criminal case for insufficiency of evidence," 17 ALR 910.

Westen and Drubel, in "Toward A General Theory of Double Jeopardy," take the view that when a trial judge rules as a matter of law that the evidence and inferences therefrom, viewed in the light most favorable to the government, would not support a finding of guilt beyond a reasonable doubt, that ruling should be "freely reviewable on appeal because, by hypothesis, it does not depend on an assessment of credibility or weight of evidence," those questions by definition being resolved in favor of the Government. Current doctrine "tends to distort the trial process," as a judge may rule in a defendant's favor and shield his ruling from review, by making it before the jury returns a verdict, thereby not only causing an "acquittal" that "might not otherwise occur," but also "guaranteeing that his ruling will never be reviewed." Westen and Drubel, at 155.

Amicus submits that the protections served by the jeopardy clause, as well as the public interest, would be served by a rule that permitted a review of a directed verdict of acquittal for legal error and a second trial if error were found, as there be no harassment of the accused, who *sought* the termination of the trial, and the public interest in the conviction of the guilty would be vindicated. As said by Justice Brown, dissenting in *Kepner*, neither the jeopardy protection nor sound policy justify placing "in the hands of a single judge the great and dangerous power of finally acquitting the most notorious criminals" when a jury trial is being had.

E. Conclusion

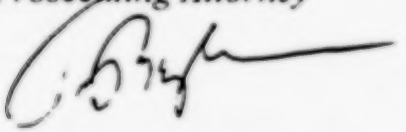
Amicus thus submits that *this* court, in view of the historical development of the jeopardy protection and its

mission, should hold that a directed verdict of acquittal may be reconsidered by a trial court prior to discharge of the jury, and the trial then continued if legal error is found. Finally, amicus submits that, though this court may not reach this result, the law and the public would be better served, if the jeopardy clause were understood to require that a directed verdict of acquittal be evaluated as a ruling of law, reviewable for legal error. On a finding of legal error by the trial court, a second trial would be allowed, thus avoiding the immunizing of a defendant who in truth and reality has never received an actual verdict as to guilt or innocence.

RELIEF

WHEREFORE, this Court should reverse the holding of the Sixth Circuit Court of Appeals.

MICHAEL E. DUGGAN
Wayne County
Prosecuting Attorney



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